DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Rockville, MD 20857

May 26, 1994

TO: Director
Indian Health Service

FROM: Senior Attorney
Public Health Service

SUBJECT: Request for Opinion 93-141: Review of Self-Governance Compacts and Funding Agreements

You have asked for our review of fourteen self-governance compacts and annual funding agreements which Indian Health Service (IHS) has negotiated and signed. You have further asked for our advice and recommendations in moving toward a "standard IHS compact" in the future.

Title III of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472, 102 Stat. 2285 (1988) (the "Act") authorizes the Tribal Self-Governance Demonstration Project. Congress initially provided in Title III that participating tribes, under annual funding agreements with the Secretary of the Interior, were authorized to plan, conduct, consolidate and administer programs, services and functions administered by the Bureau of Indian Affairs. The annual funding agreements authorize tribes to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions or services.

Title III was amended by Pub. L. 102-184, 105 Stat. 1278 (1991), to require, among other things, the Secretary of Health and Human Services to conduct a study to determine the feasibility of extending the self-governance demonstration project to IHS activities and to establish an Office of Self-Governance within the IHS. Pub. L. 102-184, 105 Stat. 1279, § 308(a). While the study required by § 308 and other planning activities were underway, Title III was further amended by Pub. L. 102-573 to extend the authority to enter into self-governance compacts and funding agreements with tribes to the Department of Health and Human Services. See Pub. L. 102-573, 106 Stat. 4590, § 825 (1992).

We have reviewed the fourteen self-governance agreements previously entered into by the IHS and respond to the major legal issues raised by various provisions in the agreements below. There are also various minor legal issues in individual compacts

and funding agreements which we can address on an individual basis.

DISCUSSION

Implementation Issues

The compacts and funding agreements we reviewed identify the programs, functions and services covered by the agreements and the respective responsibilities of the IHS and the compacting tribe only in a very general way. The Funding Summaries provide additional detail regarding the source of funds included in the annual funding agreement. Some of the agreements address the parties' respective responsibilities through provisions under which a compacting tribe would maintain eligibility and equal access to HHS and other federal programs that the IHS Director uses to support the tribe's service population. Other compacts contain provisions which acknowledge that funding has been taken from certain Headquarters functions, but maintain the tribe's eligibility for Headquarters and Area services to the extent Headquarters and the Areas maintain those services as transitional functions.

These provisions raise important issues regarding the respective responsibilities of the IHS and compacting tribes when a tribe elects to take its tribal share for any Service Unit, Area or Headquarters program, function or service.[1] As background, the basic authority to enter into annual funding agreements is in section 303(a)(1) and provides as follows:

> (a) The Secretaries [are] directed to negotiate, and enter into, an annual written funding agreement with the governing body of a participating tribal government that successfully completes its Self-Governance Planning Grant. Such annual written funding agreement--
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> (1) shall authorize the tribe <u>to plan, conduct, consolidate, and administer programs, services and functions</u> of the Department of the Interior and the Indian Health Service of the Department of Health and Human Services <u>that are otherwise available to Indian tribes or Indians</u> . . . .

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[1] While this opinion does not address the scope of compactibility and funding under Title III, there are some programs, functions and services which must be retained by the IHS. The IHS is addressing the scope of compactibility and funding in other contexts.

Emphasis added.

Section 303(a)(6) governs the funding available to compacting tribes and provides that the annual funding agreement-

> **shall, except as provided in paragraphs (1) and (2), provide for payment by the Secretaries to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members . . . .**

Emphasis added.

By its reference to "an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act," section 303(a)(6) ties the availability of funding for self-governance agreements to sections 106(a)(1) and (2) of Title I. The language "and for any funds which are specifically related to provision by the Secretaries of services and benefits to the tribe and its members" in section 303(a)(1) does not create a new category of funding that would not be available under sections 106(a)(1) and (2).

Under the structure of Title III, the scope of funds available is dependent upon identification of the programs, services and functions the tribe is taking responsibility for under the compact and funding agreement. When a tribe elects to take its tribal share of a compactible function, the tribe is presumptively taking over that function or the capacity and responsibility to provide that function. This is made clear in section 303(b)(2) which provides that

> for the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe--
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> * * *
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> (2) shall be responsible for the administration of programs, services and activities pursuant to agreements under this title.

Because a compacting tribe has the discretion under section 303(a)(2) to redesign programs and reallocate funds, a compacting tribe may choose to receive its share of direct program funding

for a previously provided program, function or service regardless of whether the tribe will provide that same program, function or service. (Pursuant to section 303(a)(2), the annual funding agreement is to set out the terms by which the compacting tribe may redesign programs and reallocate funds.)

As a matter of implementation, when considering whether any program, function or service will be included in an annual funding agreement, section 306 requires that IHS consider the effect that compacting will have on the remaining portion of the IHS program, function or service. Section 306 provides, in part, as follows:

> Nothing in this title shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian tribe or tribal organization is eligible to receive . . . .

Section 306 anticipates that although a program, service or function may be identified as compactible, there may be instances in which the IHS cannot provide a compacting tribe its share of direct program funds for a certain program, service or function and continue to provide the same level of services to non-compacting tribes.

For fiscal year 1994, the IHS received "shortfall" funds to at least partially address this situation. Both the House and Senate Appropriations Committee reports for FY94 comment on funding shortfalls associated with the transition to compact funding. The Senate Report explains the purpose of shortfall funds as follows:

> In negotiating the programs, services and functions to be included in an annual funding agreement, there may be situations where the transfer of a portion of a program's funds to a compact tribe could jeopardize the continuation of services for non-compact tribes. These funds are provided to address these situations and in the future, IHS should budget for these costs. As more compacts are implemented, the Committee expects IHS to identify where operational and staffing reductions might be made as the tribes assume even greater responsibility and oversight of their programs.

S. Rep. No. 114, 103d Cong. 1st Sess. 111 (1993). The House Report provides essentially the same and specifically acknowledges that IHS may not be able directly to transfer funds without jeopardizing other tribes' programs. See H.R. Rep. No.

158, 103d Cong. 1st Sess. 104 (1993). If this happens, the IHS and the compacting tribe will have to come to agreement regarding how the IHS can continue to provide that program, function or service to the compacting tribe (or how it can be otherwise provided). The above report language includes the idea that the IHS is to examine its structure and staffing as contracting and compacting increase to see where it can restructure to make additional savings available to fund shortfalls or otherwise make these savings available for program use.

Perhaps the most important implementation issue involves section 303(a)(4) which provides that the annual funding agreement "shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribes and the Secretaries pursuant to this agreement." This section, in effect, implements the transfer of responsibility recognized in section 303(b)(2) and provides some structure for the transfer of responsibility from the IHS to a compacting tribe for programs, functions, and services included in the annual funding agreement. As stated above, when a tribe chooses to include its share of funds for any given program, function or service, it presumptively follows that the tribe is taking responsibility for providing that program, function or service. In other words, the compacting tribe is taking the "capability" to provide that program, function or service for which it receives funds. The corollary presumption is that the IHS gives up the responsibility or capability to provide that program, service or function.

As self-governance is getting started within the IHS, there may be situations where the IHS continues to provide a program, service or function for non-compacting tribes. In this situation, if the IHS has the capacity to provide transitional technical assistance or other services to compacting tribes, it may choose to do so. At this early (demonstration) stage of compacting, there is significant latitude for the IHS and compacting tribes to discuss and negotiate how to address these issues.

It is our recommendation, and section 303(a)(4) requires, that the IHS and each compacting tribe fully discuss, negotiate and include, in detail, the services to be provided (including the population to be served), the functions to be performed and the respective responsibilities of the IHS and the compacting tribe for each program, function and service included in the annual funding agreements and those left with the IHS. In other words, the IHS and each compacting tribe must fully discuss and come to agreement concerning the transfer from the IHS to the compacting tribe of responsibility for each program, function and service included in the annual funding agreement. The agreements must also address the remaining responsibilities of the IHS to the compacting tribe. This can be accomplished through a general provision reflecting this transfer of responsibility in the

compacts. More specificity concerning the IHS' and the compacting tribe's responsibility for individual programs, functions and services should be included in the annual funding agreements.

Advance Payments

Most of the compacts provide for advance payments in compliance with applicable Treasury Department regulations; some call for an annual lump sum payment, others require quarterly payments. These provisions raise the threshold issue whether there is authority for the IHS to make advance payments under self-governance agreements and, if so, on what basis IHS may make advance payments. We discuss below the factors we have considered in concluding that the IHS may make advance payments.

There is a general prohibition against making advance payments under "Government contracts." The prohibition is codified at 31 U.S.C. § 3324 and provides in pertinent part as follows:

> (a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.
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> (b) An advance of public money may be made only if it is authorized by--
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> (1) a specific appropriation or other law; or
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> (2) the President . . . .

There is an initial question whether this general prohibition applies to self-governance compacting at all. The Comptroller General has held that the prohibition in 31 U.S.C. § 3324 does not preclude advance funding of grants. United States General Accounting Office, Federal Appropriations Law at 5-43. In decision B-201546, the Comptroller General comments on § 3324 as follows:

> The policy of payment upon receipt of goods or services is simply inconsistent with assistance relationships where the Government does not receive anything in the usual sense. Advance payments are a fundamental part of the present Federal assistance system. (See Treasury Department Circular No. 1975 which is based on the assumption of authority to make advances to grantees.)

60 Comp. Gen. 208, 209 (1981). Accordingly, the Comptroller General concludes that unless the program legislation or appropriation from which the advance is made restricts this authority, grant authority alone is sufficient to overcome the general prohibition against advance payments. Id. See also 41 Comp. Gen. 394, 395 (1961) ("one of the advantages of the grant over the contract is advance payment of the grant may be made without the vouchering of expenditures and accompanying 'progress reports' or other 'proof of work' . . ."). In decision B-197100, the Comptroller General concluded that if an agency reasonably characterizes the relationship as a grant, the general prohibition against advance payments does not preclude payments in advance as long as the proposed method of funding such grants provides adequate fiscal controls to protect the Government's interests. 59 Comp. Gen. 424, 428 (1980).

As previously concluded by this office, self-governance compacts are unique legal instruments which do not fall neatly within the traditional relationships entered into by the government as described in the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), 31 U.S.C. § 6301 et seq. Memorandum from Hudson to Lincoln dated August 24, 1993, entitled "Facilities Construction Programs under Self-Governance." The Supreme Court has characterized compacts as "contracts" in that a compact is "a legal document that must be construed and applied in accordance with its terms." Texas v. New Mexico, 482 U.S. 124, 128, 107 S. Ct. 2279, 2283 (1987). At the same time, there are social policy aspects to "contracts" and self-governance agreements entered into pursuant to the Indian Self-Determination Act which are characteristic of grants. In Busby v. U.S., 8 Cl. Ct. 596 (1985), the Claims Court commented on the nature of self-determination contracts entered into under Title I as follows:

> The nature of these Indian contracts, which are not "procurement" oriented contracts, but are basically grant or sociological type contracts designed to accomplish government social policy goals, seem to place them outside the [Contract Disputes Act].

Id.

When the Act was amended in 1988, it was made expressly clear that Title I contracts, except construction contracts, are not procurement contracts. 25 U.S.C. § 450j(a). (Prior to 1988, contracts awarded under Title I were procurement contracts.) The Senate Report which accompanied the 1988 amendments to Title I further describes the unique nature of the transfer of responsibility and resources under Title I of the Act, as follows:

> The Indian Self-Determination Act uniquely requires the [IHS] to continue providing direct services until such time as a tribe freely chooses to contract to operate those services. At that point, the Secretaries are required to transfer resources and control over those programs to the tribe. There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously divest itself of its own resources. . . .

S. Rep. No. 274, 100th Cong. 1st Sess. 6 (1987). Title III authorizes a new relationship between the IHS and participating tribes which is similarly a non-procurement relationship under which the IHS transfers resources and responsibility for programs to tribes. Thus, as previously concluded, the self-governance authority is a unique authority having aspects common to both contracts and grants. There is a reasonable legal basis, therefore, for concluding that self-governance agreements are not "Government contracts" to which the prohibition against advance payments in § 3324 is applicable and have aspects to them characteristic of grants, under which advance payments are routinely allowed.

In addition, the Act specifically authorizes advance payments under Title I contracts and grants. Under section 105(b), 25 U.S.C. § 450j(b), the IHS may make payments to tribes in advance or by reimbursement as necessary to carry out the purposes of Title I.[2] Because tribes compacting under Title III had to have operated two or more mature Title I contracts to be eligible to participate in the Self-Governance Demonstration Project, many of these tribes were receiving payments in advance under their Title I contracts.

Although section 105(b) does not apply to Title III agreements, Title III does contain a provision at section 303(c) under which the Secretaries may negotiate payment terms in the annual funding agreements. Section 303(c) provides that "[a]t the request of the governing body of the tribe and under the terms of an agreement pursuant to subsection (a), the Secretaries shall provide funding to such tribe to implement the agreement." Viewing Title III as a progression from Title I, which allows advance payments, and with a view toward how Title I and Title

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[2] Prior to the 1988 amendments, because Title I contracts were awarded as procurement contracts, section 105(b) was necessary to exempt Title I contracts from the prohibition against advance payments under Government contracts in 31 U.S.C. § 3324.

III respectively implement the federal policy of Indian self-determination, these two provisions provide a persuasive argument that the Secretary may make advance payments to compacting tribes.

Consistent with this conclusion, the Senate Committee on Indian Affairs comments on section 403(d) of (pending) Senate Bill 1618, as follows:

> The Committee intends to have the Department of the Interior provide funding to a participating Tribe under terms negotiated in a funding agreement. Most participating Tribes appear to prefer the current practice of lump sum or quarterly advance payments and the Committee intends the Department of the Interior maintain this practice as an option under the flexible statutory authorities provided in the bill. These payment provisions of the bill are comparable to existing authorities under Title III, as amended.[3]

S. Rep. No. 205, 103d Cong. 1st Sess. 9 (1993).

As a general rule, courts are reluctant to give much weight to committee report language written after passage of the statutory provision in question. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117-118, 100 S. Ct. 2051, 2061 (1980); Cook Inlet Native Association v. Bowen, 810 F.2d 1471, 1475-76 (9th Cir. 1987). Here, however, the remarks are directly on point and are commenting on how the Department of the Interior is making payments under the authority in 303(c). While the committee report language cited above does not provide a legal entitlement to advance payments on any particular basis, it is persuasive evidence that Congress intended section 303(c) as authority to negotiate payment terms with compacting tribes based upon a liberal construction of the

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[3] Section 403(d) is almost identical to section 303(c). Section 403(d) provides as follows:

> At the request of the governing body of the tribe and under the terms of an agreement entered into under this section, the Secretary shall provide funding to the tribe to carry out the agreement.

traditional federal fiscal policy considerations regarding advance payments.[4]

In the course of considering other possible constraints on the basis on which advance payments may be made, we have looked at the effect of Office of Management and Budget (OMB) apportionment of IHS appropriations. OMB's authority to apportion appropriations comes from the Anti-Deficiency Act, 31 U.S.C. § 1511-1519. For purposes of this analysis, the most significant of these provisions is 31 U.S.C. § 1512(a), which provides as follows:

> Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period . . . shall be apportioned to achieve the most effective and economical use . . . .

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[4] In debate on H.R. 1223 (which was enacted as Pub. L. 100-472), Senators Inouye and Evans commented on advance payments as follows:

> Mr. Inouye: A question has been raised as to whether title III authorizes the payment of funds to tribes in lump sums and whether section 106(b) of the Self-Determination Act is superseded. I expect payments to be scheduled consistent with applicable Treasury regulations.
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> Mr. Evans: I concur, existing law relative to conditions for payments to tribes and disbursements to tribes are applicable. . . .

Statements such as these, made during floor debates, are not legally binding and are traditionally regarded with caution because they reflect the views of individual members. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474, 41 S. Ct. 172, 179 (1921). See also United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 318, 17 S. Ct. 540, 550 (1897). Floor debates are less authoritative than committee reports and are not regarded as persuasive where they conflict with explicit statements in more authoritative legislative history such as committee reports. U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 125, 62 S. Ct. 523, 529 (1942); B-114829, June 27, 1975.

31 U.S.C. § 1512(a).

Apportionment of funds governs the availability of those funds for obligation under an annual funding agreement. Based on discussions with Department staff knowledgeable about the IHS' budget, it is our understanding that IHS appropriations are currently apportioned on a quarterly basis. Assuming IHS has sufficient apportioned funds available in the quarter in which it is awarding a funding agreement, the usual practice is to make an award for an entire year. This obligates an agreed upon amount of funding for the entire period the funding agreement is to cover. Presuming the funds are available for obligation, the IHS may negotiate the basis for payments to be made under the funding agreement. In other words, assuming IHS has sufficient apportioned funds available at the time it is awarding a funding agreement, apportionment does not present a legal constraint on the basis on which the IHS may make those funds available.

We also note that cash management regulations published by the Treasury Department, pursuant to the Cash Management Improvement Act (CMIA), 31 U.S.C. §§ 3335, 6501 and 6503, specifically exclude Indian tribal governments. The CMIA regulations, at 31 C.F.R. Part 205, prescribe rules and procedures for the transfer of funds between the Federal government and the States for Federal grant and other programs. 31 C.F.R. § 205.3 defines "State" to exclude Indian tribal governments, as follows:

> State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, and an agency, instrumentality, or fiscal agent of a State so defined, but does not mean a local government or an Indian tribal government. (Emphasis added.)

The CMIA regulations replaced Treasury regulations which were more widely applicable to recipients of federal funds. Thus, there is currently no regulatory authority governing the timing of advance payments to Indian tribal governments under annual funding agreements.

In conclusion, self-governance compacts and funding agreements are not "Government contracts" to which the general prohibition against advance payments in 31 U.S.C. § 3324 applies and have aspects to them characteristic of grants under which advance payments are assumed allowable. As OMB currently apportions IHS funds and, provided IHS has sufficient funds available for obligation at the time IHS awards an annual funding agreement, apportionment does not legally constrain the timing of

advance payments under the annual funding agreements. Based on the above legal conclusions, under section 303(c), the Secretary has the discretion to negotiate the timing of payments made to compacting tribes.

Tribal Law and Forums

All fourteen compacts contain similar provisions making tribal law applicable to execution of the compact and implying tribal court jurisdiction over disputes involving self-governance agreements to the extent that federal law is not inconsistent. An example of one of these provisions is as follows:

> The duly enacted laws of the Tribe shall be applied in the execution of this Compact and the powers and decisions of the Tribe's Court shall be respected, to the extent that federal law, construed in accordance with the applicable canons of construction and Title III of the Indian Self Determination and Education Assistance Act, as amended, is not inconsistent.

While these provisions contain limiting language ("to the extent that federal law . . . is not inconsistent"), they imply that disputes are to be resolved by tribal courts applying tribal law. These provisions can be read to govern the resolution of beneficiaries' complaints regarding services provided under compacts and/or to subject the Federal Government to tribal law and tribal court jurisdiction for the resolution of disputes between the tribes and the Federal Government.[5] To the extent these provisions are read to subject the Federal Government to tribal law and tribal court jurisdiction, they raise legal questions regarding the law applicable to disputes concerning self-governance agreements and tribal court jurisdiction over the Federal Government. If these provisions are not intended to convey that meaning, their purpose is not clear and they should be deleted. Alternatively, if these provisions are intended to apply only to disputes between beneficiaries and the tribe regarding services provided pursuant to the annual funding agreements, these provisions should be clarified to reflect that more limited applicability.

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[5] Each of the fourteen compacts contains a more specific provision, "Tribal Administrative Procedures", regarding resolution of beneficiaries' complaints regarding services which affirms the administrative due process rights made applicable to tribal court proceedings by the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. Each compact also contains a "Disputes" provision, which addresses remedies and procedures for disputes between the Federal government and the tribe. See infra. pp. 5-6.

As discussed below, section 303(d) of Title III specifies the extent to which the sovereign immunity of the Federal Government has been waived by providing where actions are to be brought for disputes arising under self-governance agreements and for alleged violations of Title III. Section 303(d) does not subject the United States to suit or other process in tribal court. Without a clear statement by Congress waiving the Federal Government's immunity from suit in tribal court, Congress has not conferred jurisdiction over the Federal Government on tribal courts for disputes arising under self-governance agreements or for alleged violations of Title III.

The Supreme Court has established that the United States, as sovereign, "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976) citing United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 769 (1941). Only Congress has the discretion whether, and to what extent, to waive the government's sovereign immunity. Id. at 399. See also U.S. v. White Mountain Apache Tribe, 784 F.2d 917, 919-920 (9th Cir. 1986). An official of the executive branch of the United States does not have the authority to waive the sovereign immunity of the United States and thus confer jurisdiction where none otherwise exists. United States and the Klamath Tribe v. State of Oregon Water Resources Dept., 774 F.Supp. 1568, 1575 (D. Oregon 1991) citing Stanley v. Schwalby, 162 U.S. 255, 16 S. Ct. 754, 760-61 (1896). See also U.S. v. Mitchell, 463 U.S. 206, 216, 103 S. Ct. 2961, 2967 (1983) (No contracting officer or other official is empowered to consent to suit against the United States.) Further, waivers of sovereign immunity must be strictly construed in favor of the United States. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 103 S. Ct. 3274, 3277 (1983). See also United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352 (1979).

Thus, the United States may not be sued without its consent (as given by Congress) and Congress' consent is a prerequisite for jurisdiction. Mitchell, 463 U.S. at 213, n.9, 103 S. Ct. at 2965, n. 9.[6] Title III contains a limited waiver of sovereign immunity. In section 303(d), Congress has specified the forums for disputes arising under self-governance agreements and for actions resulting from alleged violations of the Act by federal officials. Section 303(d) provides, in part, as follows:

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[6] In Mitchell, the Court concluded that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims. 463 U.S. at 213, 103 S. Ct. at 2966.

> **For the purposes of section 110 of this Act [25 U.S.C. § 450m-1] the term "contract" shall also include agreements to [sic] authorized by this title . . . .**

Thus, section 303(d) incorporates section 110 of Title I. Section 110 provides in pertinent part as follows:

> **(a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by any officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated thereunder.**

Subsection 110(d) provides that "[t]he Contract Disputes Act . . . shall apply to self-determination contracts."

Section 110(d), by making the Contract Disputes Act applicable, provides for a federal administrative appeal process under which the tribe may appeal final decisions of the contracting officer to an agency board of contract appeals or directly to the Court of Federal Claims. In addition, section 110(a) allows a tribal contractor to seek injunctive relief or money damages (without restriction on the amount in controversy) in federal district court for alleged violations of the Act. See S. Rep. No. 274, 100th Cong. 1st Sess. 34-38, 62 (1987). As in Mitchell, by giving the federal district courts and the Court of Federal Claims jurisdiction over claims arising under self-governance agreements and alleged violations of Title III, section 303(d) constitutes a waiver of sovereign immunity consistent with its terms with respect to those claims. See supra. p. 3, n. 2.

Thus, sections 303(d) and 110 set out the extent to which Congress has waived the government's sovereign immunity for claims arising under self-governance agreements and for alleged violations of Title III. The waiver of sovereign immunity in

these sections provides for jurisdiction in federal forums and does not provide for tribal court jurisdiction.[7] Since Congress has not waived the government's immunity from suit in tribal court, under the Mitchell case, supra. p. 3, tribal courts lack jurisdiction over the Federal Government regarding self-governance matters.[8]

As a related matter, many compacts contain provisions in a "Disputes" section recognizing the remedies available through section 303(d) and adding various combinations of the following alternatives -- third party mediation, resolution in tribal court, or mediation as provided by tribal law. Regarding mediation generally, the IHS and the tribes may use the processes authorized and encouraged in the Administrative Dispute Resolution Act, 5 U.S.C. § 581 note, for more informal resolution of disputes arising under self-governance agreements. These processes (primarily mediation or arbitration) offer a prompt, expert and inexpensive means of resolving disputes as an alternative to litigation. As far as resolution in tribal court, as concluded above, disputes arising under compacts and funding

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[7] Because we conclude that Congress has provided for jurisdiction in federal court, and has not provided for tribal court jurisdiction, it follows that federal law rather than tribal law is applicable to resolving disputes regarding matters arising under Title III. See e.g., South Dakota v. Bourland, 113 S.Ct. 2309, 2316-17 (1993) (Supreme Court held that federal law abrogating tribal regulatory jurisdiction over certain lands precludes exercise by the tribe of incidental powers dependent on that jurisdiction).

[8] Nor is there tribal jurisdiction over the Federal government as an incident of a tribe's inherent sovereignty. While the Supreme Court has consistently recognized that Indian tribes have an inherent sovereignty over their members and their territory, United States v. Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710, 717 (1975), that sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086 (1978). To exercise tribal sovereignty beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the status of tribes within the Federal system, and so cannot survive without express congressional delegation. South Dakota v. Bourland, supra. 113 S.Ct. at 2319-20 (1993) (citation omitted). Here, to assert tribal jurisdiction over the Federal government goes beyond tribal self-government and, therefore, requires Congress' express consent.

agreements may not be submitted to tribal courts nor is the Federal Government subject to tribal law. To the extent "mediation as provided by tribal law" would submit the Federal Government to tribal law or tribal court jurisdiction, there is similarly no authority for such a means of dispute resolution.

In conclusion, the various provisions in the compacts which arguably would subject the Federal Government to tribal law and/or tribal court jurisdiction cannot be read to constitute a waiver of the sovereign immunity of the United States. A federal official, such as the IHS Director here, cannot waive the Federal Government's sovereign immunity in an agreement such as the self-governance compacts. Only Congress has the authority to waive the government's immunity from suit and has provided a limited waiver of sovereign immunity in section 303(d), which does not include tribal court jurisdiction. To the extent the "Tribal Law and Forums" provisions in the compacts are intended, or can be read, to apply to disputes between the tribes and the Federal Government, they are inconsistent with federal law. By their own terms, therefore, these provisions are of no effect in setting out the relationship between the tribes and the Federal Government. Accordingly, we recommend that such provisions not be included in new compacts and that they be deleted from existing compacts as those compacts are reviewed in the process of evaluating this demonstration project.[9] Alternatively, if these provisions are intended to apply only to disputes between beneficiaries and the tribe regarding services provided pursuant to the self-governance agreements, the provision should be clarified to reflect that more limited applicability.

Audits

Most of the compacts contain provisions under which the tribe agrees to provide the IHS an annual single organization-wide audit as prescribed by the Single Audit Act of 1984, 31 U.S.C. § 7501 et seq., and further agrees to follow OMB Circular A-128, "Audits of State and Local Governments." In these "Audit" provisions, the tribes generally agree to follow the cost principles set out in OMB Circular A-87, "Cost Principles for State and Local Governments." Provisions in many of the compacts, however, would "freeze" the Circular as of a certain date; revisions to the Circular after that date would not

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[9] It can be argued that if these provisions are of no effect, there is no harm in including them in the compacts. In our view, however, in the spirit of negotiating compact provisions which in good faith both parties agree set out their relationship under the agreement, it may raise false expectations for the IHS Director to agree to include a provision which implies tribal court jurisdiction over the IHS.

automatically apply. A typical provision addressing revisions to the Circular provides as follows:

> **1. The revisions shall not apply to the Compact unless agreed to by the Tribe until the Secretary determines their applicability as provided below.**
>
> **2. The Secretary shall immediately review the revisions in consultation with the Tribe to determine if the revisions are detrimental to the self-governance project or inconsistent with the terms of the Act.**
>
> **3. If it is determined that the revisions are neither detrimental nor inconsistent with the intent of the Act, the Secretary will amend this Compact to include those revisions.**

Many compacts also set out certain costs with respect to which the Secretary is to seek OMB concurrence to treat as allowable without advance Secretarial approval. The above provisions raise issues regarding the scope of this Department's discretion to determine whether revisions to the Circular apply as well as to approve requests for deviation from specific cost principles.

OMB Circular A-87 establishes principles and standards for determining costs applicable to grants, contracts and other agreements with States and local governments and federally-recognized Indian tribal governments. See OMB Circular A-87, 53 Fed. Reg. 40352, October 14, 1988, ¶ 5 (a). See also 25 U.S.C. § 450j-1(e); S. Rep. No. 274, 100th Cong., 1st Sess. 17, 18 (all references to cost principles in the Act are to Circular A-87). The Circular is intended to provide the basis for a uniform approach to determining the federal share of costs under federally-assisted programs. 53 Fed. Reg. at 40352, ¶ 3. Circular A-87 was issued pursuant to the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; Reorganization Plan No. 2 of 1970; and Executive Order 11541.

This Department is bound to follow the cost principles set out in the Circular and has only the discretion permitted under the terms of the Circular to make exceptions regarding the applicability of its principles. In paragraph 4, OMB has reserved to itself the discretion to approve exceptions to general applicability of the Circular. See 53 Fed. Reg. 40352 ("Any other exceptions [in addition to publicly financed educational institutions or publicly owned hospitals] will be approved by OMB in particular cases where adequate justification

is presented.") Under this provision, this Department does not have the discretion to decide that revisions to the Circular do not automatically apply. See Decision of the Director, IHS, Bristol Bay Area Health Corporation v. IHS, June 24, 1992 at 9 (similar language in OMB Circular A-45 reserving authority to grant exceptions to OMB found to circumscribe IHS' discretion to approve proposal deviating from the Circular's provisions). Where this Department does not have the discretion to grant exceptions independent of OMB, the Department may request exceptions from OMB on behalf of a tribe seeking an exception from a specific provision of the Circular.[10]

Concerning determinations of allowability of particular costs, Attachment A to the Circular sets out principles for determining applicable costs; Attachment B identifies selected items of cost and explains how such items are routinely treated. 53 Fed. Reg. at 40353-40361. The determination of the allowability of costs not mentioned is to be determined based on the treatment of standards provided for similar or related items of cost. Id.

In conclusion, this Department is bound to follow the cost principles set out in OMB Circular A-87. The Department's discretion to approve exceptions to general applicability of the Circular is limited by paragraph 4 of the Circular, in which OMB reserves to itself the discretion to approve exceptions from general applicability of the Circular. The Department must therefore seek OMB concurrence to approve exceptions from specific provisions of the Circular. Concerning determinations of the allowability of particular items of costs, the Circular provides standards and examples to be applied in establishing the allowability of particular costs. It is our recommendation that the IHS, along with appropriate Department and tribal officials, review the Circular and draft a standard provision in accordance with this Department's discretion under the Circular. Procedures for requesting exceptions or deviations could also be set out in the "Audit" provisions.

Records

Most of the compacts contain "Records" provisions which provide that "[e]xcept as clearly required, tribal records are not deemed federal records, and are not deemed subject to Privacy Act and FOIA." The Business and Administrative Law Division

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[10] In addition, any revisions to the Circular would presumably be published in the Federal Register with an opportunity for comment prior to becoming final. Tribes and the IHS would, therefore, have an opportunity to review and comment on any proposed revisions prior to such revisions becoming final.

(BAL), OGC, is currently working on an opinion which will address whether records maintained under self-governance programs are subject to the Privacy Act and Freedom of Information Act. We have requested that BAL coordinate its response with this Division.

Property

Most of the compacts contain provisions which state that the Secretary shall make available reasonably divisible real and personal property that the Department has previously used. Several compacts provide that the Secretary shall make available or transfer title to such property. Because Title III does not contain a specific provision addressing use or transfer of real or personal property, we are providing the following general guidance regarding the IHS' authority to make real and personal property available to compacting tribes for use in carrying out Title III programs.

As a general rule, an executive agency may not give away federal property without specific statutory authority. Royal Indemnity Co. v. United States, 313 U.S. 289, 294, 61 S. Ct. 995, 997 (1941). The authority "to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2." Id.

Section 105(f) of Title I, 25 U.S.C. § 450j(f) authorizes the use, acquisition and donation of certain federal real and personal property suitable for use under contracts and grants under sections 102 and 103 of the Act. Because of the constitutional prohibition against disposing of federal property without specific statutory authority, it is difficult to read Title III as incorporating the authorities concerning property in Title I into Title III. As a demonstration authority, it is possible that Congress did not intend the Department to have the same authority concerning property under Title III as under Title I. However, in S. 1618, which would give the Department of the Interior permanent authority to enter into self-governance agreements, there is similarly no provision for use or acquisition of federal real or personal property. While in our view it is a significant oversight not to have addressed use and acquisition of federal property in Title III directly, we will continue to research the extent to which the canons of construction in Title III can be used to incorporate the authorities in section 105(f) into Title III.

Independent of the authorities in Title I, an executive agency may make federal real or personal property available for use through revocable licenses or permits. See Delegation of Authority Concerning Real Property Management dated November 23, 1984; 38 Comp. Gen 36, 37 (1958); 44 Comp. Gen. 824, 825 (1965); 55 Comp. Gen. 688, 689 (1976). These decisions generally hold

that a federal department or agency has authority to grant a revocable license to use Government property, subject to termination at any time at the will of the Government, provided that such use does not harm the property and serves some purpose useful or beneficial to the Government. 44 Comp. Gen. at 825. Under this general administrative authority, upon a finding by the IHS that the above conditions are met, the IHS may make such property available for use, through a revocable license, by a compacting tribe in carrying out the program covered by the annual funding agreement.

Concerning those compacts which provide that the Secretary shall transfer title to personal or real property, under the Federal Property and Administrative Services Act (FPASA), at 40 U.S.C. § 484(k), the Secretary is authorized to transfer property which GSA has determined to be surplus to public and non-profit private organizations for public health purposes. In fixing the sale or lease value of property to be disposed of under the FPASA, the Department is required to take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by the transferee organization. Under the Department's regulation at 45 C.F.R. § 12.9, transferees are entitled to an allowance based on the degree of public benefit (in this case, public health services) that will result from the proposed use of the property.

It is our recommendation that additional detail be added to the "Property" provisions in the compacts clarifying the authority and processes for the use of or transfer of title to federal property under general administrative authorities and the FPASA. We will continue to look into the possibility of reading Title III as incorporating the authorities in section 105(f) of Title I into Title III.

Reallocation

The compacts contain "Reallocation" provisions which typically provide as follows:

> Reallocation of funds from one program, activity, function, or service to another within a General Budget Category, or from one General Budget Category to another shall be governed only by tribal law and procedure and shall not require Secretarial consent. The Tribe's use of funds under this Agreement shall be subject to specific directives or limitations as may be included in applicable Congressional appropriations Acts.

The ability to reallocate funds is a key feature of the self-governance demonstration authority. The basic authority to

reallocate funds is found in section 303(a)(2), which provides that "subject to the terms of the [annual funding] agreement"[11] the agreement "shall authorize the tribe to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions and services." Section 303(a)(5) further provides that the annual funding agreement

> shall specify the authority of the tribe and the Secretaries, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;[12]

There are two primary points which affect the general authority of the tribes to reallocate funds, both of which relate to the purpose for which IHS funds are appropriated and used. It is a fundamental rule of federal appropriations law that appropriated funds may be used only for the purposes for which they were appropriated. 31 U.S.C. § 1301(a). See generally Federal Appropriations Law at 4-2. Congress appropriates funds to the IHS "[f]or expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act . . . ." Department of the Interior and Related Agencies Appropriations Act, 1994, Public Law 103-138 (107 Stat. 1379, 1408). Under this language and the broad language of the Snyder Act, 25 U.S.C. § 13[13], the IHS has broad authority to spend appropriated funds to provide health care to Indians. Thus, compacting tribes may reallocate funds from one activity to another so long as IHS funds are used for health purposes. While this may not seem like much of an

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[11] In addition to the federal appropriations law restrictions set out below, under the language of section 303(a)(2), a tribe would be bound by whatever terms it agreed to in the compact or funding agreement regarding reallocation of funds.

[12] In addition, section 304 provides in pertinent part that "[t]he use of funds pursuant to this title shall be subject to specific directives or limitations as may be included in applicable appropriations Acts." (This same language is included in most of the "Reallocation" provisions in the compacts.) Under section 304, funds which are identified for specified purposes must obviously be used according to the terms of those earmarks and may not be reallocated.

[13] The Snyder Act provides, in pertinent part, that appropriated funds may be spent for the "relief of distress and conservation of [Indian] health". 25 U.S.C. § 13.

issue at this time, where IHS and BIA programs, functions and services are included in one annual funding agreement, it will be important to specify that compacting tribes must use IHS funds for health purposes and not transfer IHS funds for use under BIA programs.

A second restriction on the authority of tribes to "reallocate" funds is that funds may not be transferred from one appropriation account to another. See 31 U.S.C. § 1532.[14] A "transfer" differs from reallocation or reprogramming in that a transfer involves the shifting of funds between appropriations. Federal Appropriations Law at 2-20. For example, IHS' annual appropriation is composed of two lump-sum accounts, one for "Indian Health Services" and another for "Indian Health Facilities." (For a thorough discussion of IHS budget justifications and appropriations, see Memorandum to Quality Management Committee from OGC/PHD dated October 24, 1990, entitled "Reprogramming by Tribal Contractors.") Under section 303(a)(2), compacting tribes may reprogram or reallocate funds from one activity to another within the services category or within the facilities category. A prohibited transfer would occur, however, if funds from the services category were used for purposes for which funds from the facilities category are authorized to be used, or vice versa.[15]

In conclusion, section 303(a)(5) requires that the funding agreement specify the authority and procedures to be used in reallocating funds within a project year. As discussed above, compacting tribes may reallocate funds from one health-related

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[14] Transfer of appropriations is prohibited because it would constitute an augmentation of the receiving appropriation, and if it resulted in overobligation of the receiving appropriation, would violate the Anti-Deficiency Act, 31 U.S.C. § 1301(a).

[15] There are currently limited exceptions to this general rule in the appropriation language itself. For example, the general administrative provisions of the Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. 103-138, 107 Stat. 1379, 1408 (1993), states that appropriations in that Act "shall be available for purchase, renovation and erection of modular buildings and renovation of existing facilities . . . ." Id. at 1409. This language has been found to permit the use of IHS funds from either appropriation account for the purchase, renovation and erection of modular buildings. See Memorandum from Hudson to McCloskey dated April 5, 1994 entitled "Use of Funds for Modular Buildings."

activity to another within an IHS budget category and may not transfer IHS "services" funds to be used for "facilities" purposes. While it is not clear that "General Budget Category" as used in the above "Reallocation" provision has the same meaning as an IHS Budget Category, e.g., "services" or "facilities," it is our recommendation that these provisions be clarified to provide that IHS funds appropriated for services may not be "transferred" and used for facilities purposes, or vice versa. More generally, as shown above, reallocation of funds under self-governance agreements is subject to federal appropriations law and not solely tribal law, as some of the "Reallocation" provisions currently provide. Within these general outlines, the procedures the IHS and each compacting tribe agree will be used to reallocate funds or modify budget allocations should be set out in the funding agreements.

Regulatory Authority

The "Regulatory Authority" provisions in the compacts vary and address several related issues--program guidelines, federal regulations and waiver authority. The program guideline provisions typically provide that the tribe either: (1) is not required to abide by federal program guidelines, manuals, and policy directives except those specifically agreed to or published in the Federal Register; or (2) will generally abide by federal program guidelines, but may develop its own, in which event it will notify the IHS that it is doing so. The tribes generally agree to abide by federal regulations published in the Federal Register.

The provisions in the compacts regarding program guidelines and federal regulations are generally consistent with the law in this area. IHS' program guidelines, manuals or other policy issuances may generally be characterized as general statements of policy. The Supreme Court has described agency statements of policy as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." Lincoln v. Vigil, 113 S.Ct. 2024, 2034 (1993) quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n. 31, 99 S. Ct. 1705, 1718 n. 31 (1979). Such "rules" need not be promulgated through the Administrative Procedure Act's legislative rulemaking procedures and do not have the force and effect of law. On the other hand, "legislative" or "substantive" rules which the agency publishes using the APA's legislative rulemaking procedures do have the force and effect of law and are legally binding on the public. See Chrysler, 441 U.S. at 302-304, 99 S. Ct. at 1717-19.

Many of these sections in the compacts also contain procedures for the waiver of federal regulations. Section 303(e) is relied upon as authority for the Secretary to waive federal regulations which the Secretary or the tribe determines present

an obstacle to the carrying out of the compact. Section 303(e) provides that "[t]o the extent feasible, the Secretaries shall interpret federal laws and regulations in a manner that will facilitate the agreements authorized by this title." Section 303(e) is more accurately characterized as a canon of statutory construction instead of a waiver authority. (Compare section 105(a) of Title I, 25 U.S.C. § 450j(a).)

Concerning an agency's discretion to excuse compliance with its regulations, as a general rule, an agency must comply with its own regulations. See Service v. Dulles, 354 U.S. 363, 388, 77 S. Ct. 1152, 1165 (1957). There are certain exceptions to this general rule, particularly in the area of administering procedural rules. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 540, 90 S. Ct. 1288, 1293 (1970) ("It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it".)

In addition, Executive Order 12875 (58 Fed. Reg. 58093, October 28, 1993), encourages ("to the extent practicable and permitted by law") increased flexibility in considering requests for waivers by State, local and tribal governments from statutory and regulatory requirements "that are discretionary and subject to waiver by the agency." Id. Under this Executive Order, agencies are requested to review and streamline their waiver application process. To streamline the process for obtaining regulatory waivers, federal agencies are to consider waiver applications "with a general view toward increasing opportunities for utilizing policy approaches at the state, local and tribal level" where the application is consistent with federal policy approaches. Id. The OMB has issued additional guidance for implementing E.O. 12875.

In conclusion, there is no express waiver authority in Title III. To the extent section 303(e) is referred to as a waiver authority, such provisions should be deleted from the agreements. Whether the IHS may waive any particular regulation under its general agency discretion or under E.O. 12875 can be addressed on a case-by-case basis.

Retrocession and Reassumption

Each compact contains a retrocession provision. About half of these provisions state that retrocession will be effective 1 year from the tribe's request; the other half provide that the IHS shall take responsibility for retroceded programs within 45 days of the tribe's request.

Section 303(a)(8) provides that the annual funding agreement shall allow for retrocession of programs pursuant to section

105(e) of the Act, 25 U.S.C. § 450j(e). Section 105(e) provides that

> [w]henever an Indian tribe requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective one year from the date of the request by the Indian tribe or at such date as may be mutually agreed by the Secretary and the Indian tribe.

Under the language in section 105(e), the IHS may agree to an effective date other than 1 year from the date of request. By doing so, the IHS is committing itself to take over responsibility for a program within the shorter or longer time agreed to in the compact. While the IHS may agree to take responsibility for a program within less than a year, it may want to provide that any shorter timeframe reflect the time it will take to reestablish the capability to operate that program, e.g., hire staff, etc.

In addition, most "Program Evaluation" provisions give IHS authority to reassume programs where, for example, the IHS determines that "life or health are endangered by the Tribe's action or inaction" or there is an "imminent threat to health and safety." Unlike Title I, Title III does not contain a reassumption authority. Again, the IHS may agree to take on this additional responsibility. If IHS agrees to these reassumption provisions, it is our recommendation that the IHS assure it has the capability under the compact to know when conditions under the program present an imminent threat to health and safety or otherwise meet the reassumption standard agreed to in the compact.

Medicare/Medicaid and other Reimbursement Funds

Most of the compacts and/or funding agreements provide that Medicare, Medicaid and other reimbursement funds collected by the tribe will be treated as supplemental funding. These provisions state that the tribes may retain such funds and spend them according to a plan adopted by the tribe or carry them forward for expenditure in succeeding years. We are providing the following general guidance regarding third party reimbursements.

With respect to Medicare and Medicaid, a tribe may receive reimbursement for providing covered Medicare and Medicaid services in one of two ways: (1) by operating a program in an IHS-owned facility and using IHS' provider number; or (2) by operating a tribally-owned facility and using its own provider number.

Before 1976, the law usually prohibited payments by Medicaid and Medicare to IHS facilities. In 1976, Congress enacted Title IV of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 et seq., which amended Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act. The Social Security Act, as amended, permits payments to certain types of IHS-owned facilities for medical services provided to Indians eligible for Medicare or Medicaid. The statute restricts the use of these funds for the purpose of improving IHS facilities to meet the standards set out in the Medicare and Medicaid programs.

As noted above, only IHS facilities, whether directly operated by the IHS or operated by a tribe or tribal organization under the Indian Self-Determination Act, may receive reimbursement under Title IV of the IHCIA. Thus, as a general rule, a tribally-owned facility may not receive Medicare and Medicaid reimbursement under Title IV. However, a tribe or tribal organization operating a tribally-owned facility may, upon compliance with certification requirements, receive its own provider number. In such a case, the tribe or tribal organization would bill and receive reimbursement from Medicare and Medicaid like any other non-governmental provider of services. Moreover, unlike funds received through Title IV of the IHCIA, the purposes for which funds received by a tribe or tribal organization in a tribally-owned facility may be used are not restricted by statute.

In conclusion, the permissible use of Medicare and Medicaid reimbursements by each compacting tribe will depend on whether it receives reimbursements under the authority of Title IV of the IHCIA or under its own provider number. The compact provisions regarding Medicare and Medicaid reimbursement in each tribe's compact should reflect the manner in which the tribe receives such reimbursements.

Besides Medicare and Medicaid reimbursements, tribes may now recover funds from insurance companies for services provided to insured patients under section 206 of the Indian Health Care Improvement Act, 25 U.S.C. § 1621e. As originally enacted, section 206 provided a right of recovery for the United States for health care services provided to an Indian patient at a private hospital that the patient's private insurance would otherwise cover. In 1992, Congress amended section 206 to include a right of recovery for tribes and tribal organizations. Section 206, as amended, provides that the United States, tribes, and tribal organizations have the right to recover the cost of direct services provided to IHS eligible beneficiaries from private insurance companies, even if the insurance contract specifies that it will not cover services provided in federal facilities at no cost to its beneficiaries.

Section 207 of the IHCIA, 25 U.S.C. § 1621f, provides, in pertinent part, that tribes may retain reimbursements received or recovered under section 206. Tribes may use these reimbursements and other funds recovered for facilities purposes or to carry out health programs.

Trust Relationship

The compacts contain various provisions which address the "trust responsibility" of the IHS. This office will be addressing the relationship between the IHS and tribes in a separate opinion in response to a previous request from the IHS. We can provide further analysis of the relationship of the IHS to compacting tribes once that opinion is completed.

Insurance

All of the compacts and/or funding agreements contain "Insurance" provisions stating that the Federal Tort Claims Act (FTCA) coverage provided to tribes under section 102(d) of Title I, 25 U.S.C. § 450f(d), is extended to tribes carrying out activities under self-governance agreements authorized by Title III. The effect of section 102(d) is to make the Federal Tort Claims Act the exclusive remedy for claims of injury or death caused by a tribal employee carrying out a contract entered into pursuant to sections 102 or 103 of the Act. Section 308 of Public Law 103-138, the Department of the Interior and Related Agencies Appropriations Act, 1994 amends section 314 of Public Law 101-512 (section 102(d)) by striking the words "cooperative agreement" and inserting "any other agreement or compact." The effect of this provision is to extend FTCA coverage to tribal employees carrying out self-governance agreements authorized by Title III.

CONCLUSION

In general, the compacts are to set out the relationship between the IHS and each compacting tribe; the annual funding agreements, among other things, are to set out more specifically the respective services and functions to be performed and responsibilities of the IHS and each compacting tribe during the period covered by the agreement.

Based on the above discussion of the major legal issues involved, our primary recommendation is that more detail is needed in the funding agreements to clarify each party's respective functions and responsibilities under the agreements. In addition, while many of the compact provisions are not necessarily contrary to law, many of the provisions are very general and, therefore, lack meaningful definition regarding the law or procedures that are applicable to any particular activity. Accordingly, the IHS and compacting tribes may want to review the

laws of general applicability discussed above and refine the appropriate compact provisions accordingly.

At your request, we will continue to work with the IHS in implementing the above recommendations and otherwise working toward standard IHS compact and funding agreement provisions where appropriate.

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